(10)

FILED
MAR 26 1942
CHARLES ELMORE CROPLEY
CLERK

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1941.

LILLIAN I. RANDALL,
Petitioner,
vs.
LABADDIE BOTTOMS RIVER PROTECTION DISTRICT OF FRANKLIN COUNTY, MISSOURI, a Corporation,
Respondent.
No. 981.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

GUSTAVUS A. BUDER, JR.,
500 Buder Building,
St. Louis, Missouri,
RANDOLPH H. SCHAPER,
Washington, Missouri,
ERWIN E. SCHOWENGERDT,
500 Buder Building,
St. Louis, Missouri,
Counsel for Respondent.

St. Louis Law Printing Co., 415 North Eighth Street. CEntral 4477.

INDEX.

Page

Restatement of questions presented by petitioner to the Supreme Court of the United States 1

Statement of facts 3

Errors of fact appearing in petition for writ of certiorari and brief 11

Brief 16

Argument 30

A. Petitioner's contention that her constitutional rights were denied by the decision of the Supreme Court of Missouri holding that the amendment of the original plan of reclamation did not operate as an abandonment of the original plan of reclamation and of all proceedings, decrees, records, resolutions, levies and liens thereunder, and that consequently the annual levy of installment and maintenance taxes for the year 1934, based upon such original plan and proceedings, was not void, presents no federal question, is not a sound contention, is devoid of merit, is fictitious and frivolous 30

B. Petitioner's contention that her constitutional rights were violated by the state court because it held, in construing constitutional state procedural statutes, that under such statutes the trial court was acting within its statutory discretion in permitting the plaintiff to amend its petition in this case after trial and before judgment, and that there was no change of cause of action by amendment, presents no federal question, is devoid of merit and frivolous 35

C. Petitioner's contention that her constitutional rights were violated because the State Court refused to hold, under the evidence, that "as a matter of law" her lands had not been directly benefited by the construction of the improvements provided for under the plan of reclamation and the amendments thereto, and that therefore her lands had been unjustly and arbitrarily assessed, is not sound, presents no federal question, is without merit or substance, and is frivolous..... 37

D. The constitutional rights of petitioner were not violated by reason of the refusal of the State Supreme Court to transfer the cause to the Court en banc 41

E. The decision of the Supreme Court of Missouri, under the evidence in this case, was correct and was for the right party; it denied petitioner none of her constitutional rights, and her petition for a writ of certiorari should be denied..... 41

Appendix sections of Missouri statutes involved..... 43

Chap. 79, Art. VII, Sec. 12538..... 43

Chap. 6, Art. VI:

Sec. 971 43

Sec. 973 44

Sec. 974 44

Sec. 969 44

Sec. 970 45

Cases Cited.

Adams v. Russell, 229 U. S. 353, l. c. 358 et seq. 18

Allen v. Arguimbau, 198 U. S. 149..... 19

Amos v. Fleming et al., 221 Mo. App. 559..... 21

Ark. So. R. R. Co. v. German Nat. Bank, 207 U. S. 270 .....18, 19

Bacon & Sons v. Martin, 305 U. S. 380, l. c. 381..... 17

Baltimore Tr. Co. v. Baltimore Belt R. R. Co., 151 U. S. 137, l. c. 138 16
Bammert v. Kenefick (Mo.), 261 S. W. 78..... 22
Bank v. Phillips, 179 Mo. App. 488..... 22
Bartlett Trust Co. v. Elliott, 30 Fed. (2d) 700, l. c. 705, aff. in 40 Fed. (2d) 351.....24, 25, 26, 27, 29, 38, 40
Beck v. Mo. Valley Drainage District, 46 Fed. (2d) 632 (certiorari denied 284 U. S. 618).....25, 26
Bigham v. Tinsley, 149 Mo. App. 468..... 23
Bilby v. Stewart, 246 U. S. 255..... 19
Bradley v. Page (A.), 46 S. W. (2d) 208..... 22
Brinkman v. Luhrs, 60 Mo. App. 512..... 23
Brown v. Ry. Co., 31 Mo. App. 661..... 23
Campbell v. Olney, 262 U. S. 353..... 20
Central Land Co. v. Laidley, 159 U. S. 103, l. c. 110... 20
Clipper Mining Co. v. Eli Mining & Land Co., 194 U. S. 220 16
Cramer v. Parker (A.), 100 S. W. (2d) 640..... 21
Daniels v. Tearney, 102 U. S. 415, l. c. 421..... 24
Davidson v. New Orleans, 96 U. S. 97, l. c. 104-5....27, 38
Doyle v. Atwell, 261 U. S. 590..... 19
Dunn v. Fort Rend County, 17 Fed. 329, l. c. 333..... 29
Dyer v. Harper, 336 Mo. 52..... 22
Embree v. Kansas City and Liberty Blvd. Road Dist., 240 U. S. 242 .....26, 28
English v. Arizona, 214 U. S. 359, l. c. 365.....24, 29, 38
Evans v. Evans, 52 S. W. 12..... 22
Fallbrook Irrigation Dist. v. Bradley, 164 U. S. 112, l. c. 157 .....27, 38
Farncomb v. Denver, 252 U. S. 7, l. c. 11.....27, 38
Ferris v. Thaw, 72 Mo. 446..... 23
First National Bank v. Board of County Commissioners, 264 U. S. 450 .....27, 38
Fischer v. Max, 49 Mo. 404..... 22
Garden of Eden Drainage District v. Bartlett Trust Co. et al., 330 Mo. 554, 50 S. W. (2d) 627, 84 A. L. R. 1078 25

Gast Realty Co. v. Schneider Granite Co., 240 U. S., l. c. 58-60 28
Gaty v. Sack, 19 Mo. App. 470..... 23
Grand Rapids & I. R. Co. v. Osborne, 193 U. S. 17.... 24
Growers' Ass'n v. Sullinger (A.), 45 S. W. (2d) 887.. 22
Guaranty Trust Co., Ex., v. Blodgett, 287 U. S. 509, l. c. 513 17
Horse Co. v. Bennett, 52 Mo. App. 333..... 22
House v. Road Imp. Dist., 266 U. S. 175.....20, 27
Huggins v. City of Hannibal (A.), 12 S. W. (2d) 504.. 22
In re Mingo Drainage District, 267 Mo. 268, l. c. 284, 183 S. W. 611 25
Interstate Amusement Co. v. Albert, 239 U. S. 560, l. c. 566 16
Jensen v. Hinderks, 338 Mo. 459..... 22
Kansas City So. Ry. Co. v. Road Improvement Dist., 266 U. S. 379 .....17, 21
Kersh Lake Drainage Dist. v. Johnson, 309 U. S. 485 17
King v. West Va., 216 U. S. 92..... 16
Klinger v. Missouri, 13 Wall. 257, 20 L. Ed. 635..... 19
Labaddie Bottoms River Protection Dist. of Franklin County v. Randall, 68 S. W. (2d) 871, l. c. 873..25, 26, 39
Laughlin v. Leigh, 226 Mo. 639..... 21
Leathe v. Thomas, 207 U. S. 93..... 18
Little River Drainage District v. St. Louis, M. & S. E. Railroad, 236 Mo. 94, 139 S. W. 330..... 25
Lynn v. Assur. Co. (A.), 111 S. W. (2d) 231..... 21
Marchant v. Penn. R. R. Co., 153 U. S. 380, l. c. 385 et seq. 16
Marrow v. Brinkley, 129 U. S. 178..... 21
McCoy v. Shaw, 277 U. S. 302..... 19
McDonald v. Oregon R. R. & Nav. Co., 233 U. S. 665..17, 21
McElvaine v. Brush, 142 U. S. 155, l. c. 160..... 17
Mekos v. Fricke, 159 Mo. App. 631.....22, 23
Mellor v. Ry. Co., 105 Mo. 455..... 23
Meyer v. Chambers, 68 Mo. 626..... 23

Miller & Lux v. Sacramento Drainage Dist., 256 U. S. 129 ..... 20, 27
Mingo Drainage Dist. v. Railway, 281 S. W. 60..... 24
Minn. etc. Ry. v. Washburn Lignite Coal Co., 254 U. S. 370 19
Moore v. Mansfield (Mo.), 286 S. W. 353..... 21
Mt. St. Mary's Cemetery v. Mullins, 248 U. S. 501.... 28
Municipal Sec. Co. v. Kansas City, 246 U. S. 63..... 19
Murdock v. Memphis, 20 Wall. (87 U. S.) 590..... 18
Myles Salt Co. v. Iberia Drainage Dist., 239 U. S., l. c. 481, 482-3, 485 28
N. C. & St. L. Railway Co. v. Walters, 294 U. S., l. c. 412 28
Newton v. Harvey (A.), 202 S. W. 249..... 23
Nickel v. Cole, 256 U. S. 222, l. c. 225..... 18
Norwood v. Baker, 172 U. S., l. c. 279..... 28
Oaks v. Short (A.), 292 S. W. 738..... 22
Oliver v. Wilkey (A.), 62 S. W. (2d) 776..... 22
Olmstead v. Smith, 87 Mo. 602.....22, 23
Owens v. Corporation Com., 41 Fed. (2d) 799..... 24
Parker v. McLain, 237 U. S. 469..... 20
Payne v. Ins. Co., 229 Mo. App. 901..... 22
Powell v. Schofield (A.), 15 S. W. (2d) 876..... 22
Quong Ham Wah Co. v. Industrial Comm., 255 U. S. 445, l. c. 448 17
Realty Co. v. Kleine (A.), 82 S. W. (2d) 605..... 22
Ridgeway et al. v. Railway, 161 Mo. App. 260..... 22
Roe v. Kansas, 278 U. S. 191, l. c. 193..... 17
Scott v. Public Service Co. (A.), 115 S. W. (2d) 518.. 22
Shepard v. Barren, 194 U. S. 553, l. c. 567.....24, 29, 38
Simon v. Kresge Co. (A.), 103 S. W. (2d) 523..... 21
Smiley v. Kansas, 196 U. S. 447..... 16
Snell v. Chicago, 152 U. S. 191.....17, 18
Stamper v. Roberts, 90 Mo. 683.....25, 40
State ex rel. James v. Young, 255 Mo. 627, 164 S. W. 579 24

State ex rel. v. Bates, 235 Mo. 262.....25, 26, 40
State ex rel. v. Galloway, 255 Mo. 637, 164 S. W. 581.. 24
State v. Moore, 159 U. S. 675.....23, 41
St. Louis Land Co. v. Kansas City, 241 U. S. 419, l. c. 429-30 28
Supreme Lodge Knights of Pythias v. Meyer, 265 U. S. 30, l. c. 32 16
Susquehanna etc. v. State Tax Com., 283 U. S. 291, l. c. 300 18
Swift v. Ry. Co. (A.), 15 S. W. 964..... 22
The Virginia Coupon Cases, 114 U. S., l. c. headnote 1, at page 270 28
Thomas v. Construction Co., 189 Mo. App. 623..... 22
Toncray v. City of Phoenix, 47 Fed. (2d) 448....26, 27, 29
United Fuel Gas Co. v. Railroad Com., 278 U. S. 300, l. c. 307 24
United Gas Co. v. Texas, 303 U. S. 123, l. c. 139..... 20
U. S. v. Payne, 264 U. S. 446, l. c. 454..... 25
Utley v. City of St. Petersburg, 292 U. S. 106, 54 Sup. Ct. 393, l. c. 595.....27, 29, 38
Valley Farms v. Westchester, 261 U. S. 155..... 27
Wall v. Parrott Silver & Copper Co., 244 U. S. 407, l. c. 411 24
Walton v. Carlisle, 313 Mo. 281..... 22
Waters-Pierce Oil Co. v. Texas, 212 U. S. 86.....16, 18
Woolridge v. Milling Co. (A.), 102 S. W. (2d) 958....21, 22
Wright v. Davidson, 181 U. S. 371, l. c. 377.....24, 29, 38
Yick Wo v. Hopkins, 118 U. S., l. c. 358-9, 366-7, 373-4 28

Statutes Cited.

Revised Statutes Missouri 1939:
Sec. 969 .....35, 44
Sec. 970 .....35, 45
Sec. 971 .....35, 43
Sec. 973 .....35, 44
Sec. 974 .....35, 44
Sec. 12538 .....30, 31, 34, 43

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1941.

LILLIAN I. RANDALL,
Petitioner,
vs.
LABADDIE BOTTOMS RIVER PROTECTION DISTRICT OF FRANKLIN COUNTY, MISSOURI, a Corporation,
Respondent.
No. 981.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

RESTATEMENT OF QUESTIONS PRESENTED BY PETITIONER TO THE SUPREME COURT OF THE UNITED STATES.

The petitioner's statement of the seven questions presented to this Court for decision cannot be approved or accepted under the evidence, the record and the opinion of the Supreme Court of Missouri.

Upon final analysis, the several questions presented seem to narrow down to four propositions. Simply and concisely stated, as we understand them to be, they are:

A.

Were the constitutional rights of petitioner violated by the decision of the Supreme Court of Missouri construing the statutes of Missouri (admitted to be constitutional) with respect to the effect of amending the original Plan of Reclamation of respondent district and by that Court's holding that under the evidence the amendment of said Plan did not constitute an abandonment of the original Plan of Reclamation or of the proceedings, decrees, records, resolutions, levies, contracts or liens perfected thereunder?

B.

Were the constitutional rights of petitioner violated by the decision of the Supreme Court of Missouri construing and applying constitutional statutes of Missouri, with respect to procedure and amendment of pleadings, to permit the plaintiff to amend its petition in this case after trial and before judgment?

C.

Was petitioner denied her constitutional rights by the Supreme Court of Missouri in deciding that **as a matter of law** it could not be held that the lands of petitioner had not been directly benefited by the construction of the improvements provided for in the Plan of Reclamation and amendments thereto, in view of the fact that: (1) Petitioner had offered no evidence tending to show that her lands had not been benefited or that her lands had been inequitably or arbitrarily assessed; (2) petitioner's predecessor in title had filed the original petition praying for the incorporation of respondent District to make the improvements provided for in said Plan of Reclamation; (3) no objections or exceptions had been filed by petitioner's

predecessor in title to the Plan of Reclamation, or the amendments thereto, or to the assessment of benefits against petitioner's land, as permitted by statute?

D.

Were the constitutional rights of petitioner denied by reason of the refusal of the State Supreme Court to transfer the cause to the Court en Banc?

STATEMENT OF FACTS.

To assist the Court in the exercise of its discretion in this matter, we believe it is neccessary in this case to submit a concise statement of the material facts relevant to the issues raised.

The action is to enforce a lien for an unpaid annual installment of levee and maintenance taxes for the year 1934, aggregating $250.02, against certain lands owned by petitioner. The trial court found the issues for plaintiff and entered judgment. Defendant appealed to the Supreme Court of Missouri, which affirmed said judgment.

Respondent District was organized in 1923 and all proceedings for the incorporation and the levying of the tax in question were had under and pursuant to Chapter 28, Article IX, Sections 4597 et seq., Rev. Stat. Mo. 1919 (now Chapter 79, Article VII, Sections 12492 et seq., Rev. Stat. Mo. 1939).

The constitutionality of the statutes is not questioned by petitioner.

The petitioner has not questioned the sufficiency, form or substance of the proceedings had under said statutes (Mo. Sup. Ct. Opinion, pp. 183-184, and p. 17, Petition for Writ of Certiorari).

We shall not detail here the various steps taken in the proceedings of incorporation of the District, the assess-

ment of benefits, the levying of the tax, etc., but if any question should arise as to the facts, the Court will find a detailed statement thereof in the "Findings of Fact" by the trial court (Res. Add. Abs. pp. 84-102). The accuracy and correctness of the facts so stated by the trial court is not questioned by petitioner and no issue has been made as to such findings (Mo. Sup. Ct. Opinion, p. 184).

The petitioner's predecessor in title, with certain other landowners, on June 7, 1923, filed a petition in the Circuit Court of Franklin County, Missouri, for the incorporation of the respondent District, in which it alleged that **the lands in question were in a contiguous body** and prayed that its lands be included in the District; that it desired to form such district for the purpose of having its lands protected from the effect of wash or bank erosion by the Missouri River, and that the **present wash and bank erosion would continue unless protection be had** (Plf. Ex. 1, Res. Add. Abs. pp. 4-9).

Upon the filing of said petition all statutory procedures were had and followed for the incorporation of said District, the election of supervisors and the adoption of a Plan of Reclamation.

The Plan of Reclamation, prepared by engineers, provided for the construction of standard current retards in the Missouri River, at the points where the river was cutting, to prevent bank wash and erosion, the estimated cost of which was $45,000.00; also the Plan provided for certain levees and ditches, the estimated cost of which was $17,000.00. The engineers' report attached to said plan stated:

> "In order to afford protection from erosion by the Missouri River, which, if not prevented, would probably take away most of the lands within the District eventually, a series of Standard Current Retards are to be constructed along the bank where the river is now cutting" (App. Abs. p. 74).

Thereafter, commissioners were duly appointed to assess benefits and damages, who thereafter proceeded, pursuant to statute, to assess benefits and damages, and who subsequently filed, on April 17, 1924, their report in court assessing certain benefits and damages, including an assessment of benefits against the lands of petitioner.

Upon the filing of said report, notice of the filing thereof was given according to section 12508 of the statutes (Plf's Ex. 11, App. Abs. p. 56), and there was a hearing on said report.

Section 12509, Rev. Stat. Mo. 1939, provided that any owner of land in the District could file objections or exceptions to such report and provided for a hearing thereon.

Petitioner's predecessor in title filed no objections or exceptions to the report of commissioners assessing benefits against the land in question, or to the Plan of Reclamation.

Thereafter, on June 18, 1924, upon a hearing, the Court entered its decree confirming said report and the assessment of benefits as therein contained, including the assessment of benefits against the lands of petitioner (Plf's Ex. 12, Res. Add. Abs. p. 25).

No appeal was taken from this decree as was permitted by section 12509.

Thereafter, the Board of Supervisors of the District adopted a formal resolution levying the tax of such proportion of said benefits on all lands, etc., to which benefits had been assessed, as was found necessary to pay the cost of completion of the improvements, and said tax was apportioned as provided by section 12511 of the statutes (Plf. Ex. 33, Res. Add. Abs. pp. 57-69).

A bonding resolution was adopted, as authorized by section 12534 of the statutes, providing for the issuance of bonds of the District in the sum of $70,000.00 (Res. Add. Abs. pp. 57-69). The bonds were subsequently sold and

the proceeds used for the construction of the planned improvements (Res. Add. Abs. pp. 56-57).

In July, 1924, pursuant to section 12510, a contract for the construction of the current retards was let for $44,400.00, and a contract for the construction of the earthworks was let, all of which works were to be completed within six months (Plf. Ex. 31, Res. Add. Abs. pp. 56-57).

On October 15, 1924, during the progress of the construction of the improvements, a petition was filed in the Circuit Court asking permission **to amend** the original Plan of Reclamation in certain minor respects (Plf. Ex. 13, **App.'s** Abs. pp. 57-62).

After notice and hearing on the petition to amend, the Circuit Court, on December 29, 1924, granted permission **to amend** the original Plan of Reclamation in certain respects (Plf.'s Ex., **Res.** Add. Abs. pp. 38-41). This amendment was made pursuant to Sections 12538 and 12532, Rev. Stat. Mo. 1939. No exceptions or objections were filed to such amendments.

Commissioners were appointed to assess any benefits and damages which might accrue under the amendments to the original plan. Commissioners filed their report; notice was given to property owners; no exceptions or objections being filed, the Circuit Court on August 13, 1925, confirmed said report. Sec. 12509, Rev. Stat. Mo. 1939, provided that exceptions or objections could be filed to the report of commissioners.

The said report of commissioners assessing benefits and damages on the plan as amended was the same as on the original plan, except as to those few landowners who were affected by the amendments, and the two reports of commissioners were identical so far as appellant's lands were concerned (Res. Add. Abs. pp. 23-24 and pp. 43-44).

The estimated additional costs of constructing the small amount of extra work required by reason of the amend-

ments to the original Plan of Reclamation did not necessitate raising any additional funds by the District and therefore the Board of Supervisors, **pursuant to Section 12538**, Rev. Stat. Mo. 1939, elected not to make any additional levy of tax based upon the decree of August 13, 1925, their levy of tax under the decree of June 18, 1924, being sufficient.

Section 12538, Rev. Stat. Mo. 1939 (hereinafter set forth in appendix hereto), provided that where the works set out in the Plan of Reclamation is found insufficient, the Board of Supervisors shall have the right to formulate amended plans containing new levees or other works, or providing for the enlargement of existing levees or other works, and that "additional assessments **may** be made" in conformity with the provisions of section 12511, the same to be made in proportion to the increased benefits accruing to the lands and other property because of the additional works.

The Taxing Resolution of September 30, 1924, and the Levy Tax Record based thereon, and the other records and proceedings resulting in the levying of the tax in question, were all based on the final decree of June 18, 1924.

The annual installment and maintenance tax for 1934 was levied by resolution of the Board of Supervisors on August 27, 1934, pursuant to section 12512 (Plf. Ex. 37, Res. Add. Abs. p. 69). The foundation for this resolution was the final decree of June 18, 1924 (Plf. Ex. 12, Res. Add. Abs. p. 25); the formal taxing resolution adopted by the Board on September 30, 1924 (Plf. Ex. 33, Res. Add. Abs. pp. 57-69), and the levy tax record filed on September 20, 1924 (Plf. Ex. 24, Res. Add. Abs. pp. 51-55).

The petitioner contends now (about eighteen years after the event) that by reason of the amendment to the original Plan of Reclamation, all decrees, proceedings, records,

levies, assessments, liens, contract obligations, etc., made prior to the amendment, were abandoned and became null and void and that none of such decrees and records could furnish any basis for the levying of the annual installment and maintenance tax for the year 1934 by resolution adopted August 27, 1934.

At the time of the filing of the petition to amend the original Plan, bonds of the respondent District in the sum of $70,000.00 had been authorized, issued, sold and were outstanding, and the money therefrom had been received by the District; the taxing resolution and bonding resolution of September 30, 1924, had all been duly adopted; the levy tax record had been prepared and filed; contracts for the construction of the improvements described in the Plan had been let in July, 1924, and, at the time the Court entered its decree on December 29, 1924, permitting the amendment, the construction of the improvements provided for had been in a large measure completed.

The amount of work under the amended plan was not decreased but it was increased to some extent. The benefits assessed against the lands of petitioner were not affected or changed in any way, nor were her lands affected in any way by said amendments.

The first annual installment and maintenance tax levied was for the year 1924.

The first delinquency in payment of the annual levy against petitioner's lands involved taxes for the year 1928.

In July, 1930, Labaddie Bottoms River Protection District, a corporation, as plaintiff, filed suit against Point Prairie Hunting and Fishing Club, a corporation, for delinquent taxes due said District for the years 1928 and 1929, assessed against the lands now owned by petitioner, in which suit judgment was rendered in favor of plaintiff

and against defendant, Point Prairie Hunting and Fishing Club. Thereafter a special execution was issued on said judgment and the lands then owned by Point Prairie Hunting and Fishing Club, a corporation, were sold by the Sheriff under such execution sale to this petitioner, Lillian I. Randall, and the Sheriff executed and delivered on March 16, 1931, five deeds for each of the five separate tracts of land to petitioner, Lillian I. Randall, which deeds were duly recorded (Plf. Exs. 38-40, Res. Add. Abs. pp. 72-80 and p. 100).

After Lillian I. Randall, petitioner herein, purchased said lands at said tax sale, she voluntarily paid to the respondent District the taxes which were due for the year 1930 (App. Abs. pp. 139-140 and Resp. Add. Abs. p. 100).

In 1932 Labaddie Bottoms River Protection District filed suit against Lillian I. Randall for delinquent taxes for the year 1931; Lillian I. Randall denied liability on the ground that her lands were not within the limits of said District and that the lands had not been benefited by the Plans of Reclamation; that upon a trial of said cause, judgment was rendered in favor of plaintiff and against defendant, Lillian I. Randall, who appealed to the St. Louis Court of Appeals, in which court said judgment was affirmed in the case of **Labaddie Bottoms River Protection District v. Randall, 68 S. W. (2d) 871.** In this case the petitioner made no claim of violation of any constitutional rights.

Thereafter, Lillian I. Randall paid 1931 taxes to respondent District (App. Abs. pp. 139-140).

On October 12, 1935, Lillian I. Randall filed a suit in equity against Labaddie Bottoms River Protection District, as defendant, in the United States District Court for the Eastern Division of the Eastern Judicial District of Missouri, which said suit raised constitutional questions and issues as to the viodness of assessments of benefits by

respondent District upon the lands of petitioner; that a trial of said suit was had and on March 23, 1938, a judgment and decree was entered against Lillian I. Randall and in favor of Labaddie Bottoms River Protection District (App. Abs. p. 41).

At the trial of the present case in the Circuit Court of Franklin County, at the conclusion of all the evidence and before judgment, the plaintiff, by leave of Court, amended its petition by striking the word "amended" before the words "Plan of Reclamation" in some five places in the amended petition. This amendment was allowed by the trial court pursuant to Sections 971, 970, 973, 969, Rev. Stat. Mo. 1939. (Hereinafter set forth in the Appendix.) Petitioner filed no affidavit showing that she was surprised or misled, nor did she ask any continuance, or for an opportunity to obtain or present any evidence which she deemed might be necessary because of such amendment. With reference to the materiality of said amendment, petitioner heretofore stated in the Supreme Court of Missouri:

> "It is not at all clear that plaintiff succeeded in amending its petition so as to state a different cause of action * * *" (Record, p. 192).

Respondent offered no evidence to sustain any of the allegations contained in her answer and replication, or to show that her lands had not been benefited by the construction of the improvements provided for in the Plan of Reclamation and the amendment thereto. Respondent offered no evidence of any fraud, or of any inequitable, arbitrary, illogical or discriminatory assessment, or of any abuse of power or authority.

Errors of Fact Appearing in Petition for Writ of Certiorari and Brief.

There are certain errors of fact appearing in the petition and brief which tend to confuse the issues, to which we find it necessary to refer:

1. Throughout the petition and brief the lands of petitioner are referred to as an "island," for example:

> **Page 14.** "petitioner's lands constitute an island in the Missouri River separated from the other and shore lands constituting the district by a wide slough * * *."
>
> **Page 15.** "that nevertheless petitioner's island was assessed on a parity with lands on the mainland of like elevation * * *."
>
> **Page 21.** "Petitioner's lands constitute an island in the Missouri River, separated from the mainland by a wide slough, * * *."

These statements tend to mislead. The lands of petitioner do not constitute an island and they have been a part of the mainland for a great many years (Plf. Ex. 14, Abs. p. 66 et seq.). The area shown on the plat immediately south of petitioner's lands were marked "unknown," not because they were in the river or under water, but because at the time of the preparation of the plat the ownership of such accreted lands had not been determined judicially. Consequently, assessment was against unknown owners.

Petitioner's predecessor in title in its petition praying for the construction of improvements to protect its lands from wash and bank erosion by the Missouri River, alleged that its acreage and that of the other property owners constituted "**a contiguous body of lands** situate in Franklin County, Missouri, and subject to overflow, wash or bank erosion" (Plf. Ex. 1, Res. Sup. Abs. p. 5).

The trial court found that lands of defendant were contiguous to other lands in the District and "her said lands are not detached from other lands within said District" (Res. Add. Abs. p. 102).

2. It is stated by petitioner:

> **Page 6.** "Whether the judgment of the State Supreme Court, which adjudged and enforces in favor of respondent a lien upon petitioner's lands, as for an annual levy on a total tax against an assessment of benefits to accrue from the making of a planned local improvement **which in fact was not made** * * *."
>
> **Page 6.** "* * * but respondent **not having constructed** and not intending to make the improvement"
>
> **Page 41.** "The sole evidence before the State Circuit Court on the question of benefits, and it probably was the only competent evidence, was respondent's original plan of reclamation, **under which no improvement was made** * * *."

These and similar statements might lead this Court to believe that none of the improvements provided for under the Plan of Reclamation was made. This is not correct. The contracts for the construction of the improvements mentioned in the original Plan had been let in July, 1924 (Res. Add. Abs. pp. 56-57), all to be completed within six months, and the major portion of the work provided for in the Plan of Reclamation had been completed by December 29, 1924, at which time permission was granted by the Court to amend the Plan in certain minor respects. After the Plan was amended, the additional work contemplated by such amendments was also fully carried out and performed.

3. It is stated by petitioner:

> **Page 21.** "When respondent had caused to be made the necessary surveys and estimates of the cost pre-

liminary to its adoption of its official 'Plan of Reclamation,' it found and concluded that it could not carry out the intention of the landowners on whose petition it had been incorporated to enclose within its levees all the lands within its corporate boundaries, for the reason that the cost of building its levees across the slough at both ends of petitioner's island so as to enclose the islands and intervening slough within its levee would be prohibited."

No basis for this statement can be found in the record.

The engineer's report accompanying the Plan of Reclamation did not contemplate the inclusion of all of the lands within the District within the levee.

At the time the plan was adopted the lands of the petitioner were owned by a hunting and fishing club. This hunting and fishing club wanted protection from wash and bank erosion (which is the protection it received under the Plan and for which protection it was assessed benefits) and said club did not want its lands included within the levee; it was not engaged in agriculture, but its lands were used for club purposes; accordingly the levee was not extended around its lands.

The assessment of benefits against petitioner's lands, covering her pro-rata cost of protection against wash and bank erosion, averaged $15.00 per acre (Res. Add. Abs. p. 91). The assessment of benefits against other landowners situated immediately south of petitioner's lands, but within the levee, averaged $21.00 to $25.25 per acre. The cost of retards for protection against wash and bank erosion was $44,400.00, and the cost of ditches, levees, bridges, etc., aggregated approximately $17,000.00. It will be observed that petitioner's lands were assessed on a pro-rata basis according to the benefits derived by such lands from the construction of retards in the river to prevent destruction of her lands from wash and bank erosion.

4. It is stated by petitioner:

> **Page 24.** "In the particular case respondent and the Commissioners disregarded the provision of the statute of general application for so classifying the lands and adopted and applied a special and unauthorized classification under which it classified them solely on the basis of elevation, without regard to whether or not they would receive any benefit from the levees and incidental works provided to be constructed. As a result of employing this classification for making its assessment, an assessment of benefits was made in both cases against petitioner's lands and in both cases arbitrarily in an amount on substantial parity with assessments made against other lands in the district of like elevation and which were provided to be enclosed within the proposed levees and afforded protection by the levees and incidental improvements provided in the plans."

No evidence can be found in the record to support these statements.

If the Commissioners did not comply with the law (of which there is no evidence), petitioner's predecessor in title could have filed eighteen years ago, as permitted by Section 12509, R. S. Mo. 1939, exceptions and objections to the report of the Commissioners which was filed on April 17, 1924.

If the Commissioners did not comply with the law, such facts should have been pleaded in the prior suit against Lillian I. Randall for taxes for the year 1931 and also in the present suit, and petitioner should have offered evidence to support such statements.

The trial court found that the Commissioners made the assessment in accordance with the statutory requirements (Res. Add. Abs. pp. 88-91).

The statement that petitioner's lands were assessed

"arbitrarily in an amount on substantial parity with assessments made against other lands in the District of like elevation * * * within the proposed levees * * *" is not supported by any evidence. Petitioner offered no evidence. Nothing can be found in the record tending to show any arbitrary, inequitable, illogical or unjust assessment. The trial court found that "there was no evidence tending to establish that the assessment against defendant's lands was inequitable, illogical, arbitrary or discriminatory" (Res. Add. Abs. p. 102).

BRIEF.

I.

No federal question in this case, because the decision of the state court involved the determination of certain questions of fact, correctly decided upon the evidence, and the construction of certain state statutes, admitted to be constitutional, and their application to such determined facts.

(1) Findings of fact by state courts, when supported by the evidence, are binding on this Court.

Interstate Amusement Co. v. Albert, 239 U. S. 560, l. c. 566;
King v. West Va., 216 U. S. 92;
Waters-Pierce Oil Co. v. Texas, 212 U. S. 86;
Smiley v. Kansas, 196 U. S. 447;
Clipper Mining Co. v. Eli Mining & Land Co., 194 U. S. 220.

(2) The ascertainment of what is essential under the state statute is a state question within the final jurisdiction of the highest court of the state. When the state court decides that a particular formality was or was not essential under a state statute, such decision presents no federal question.

Marchant v. Penn. R. R. Co., 153 U. S. 380, l. c. 385 et seq.;
Baltimore Tr. Co. v. Baltimore Belt R. R. Co., 151 U. S. 137, l. c. 138.

(3) The meaning attributed by the Supreme Court of Missouri to a statute of Missouri must be accepted by this Court, on review, as though such meaning had been specifically expressed in the statute.

Supreme Lodge Knights of Pythias v. Meyer, 265 U. S. 30, l. c. 32;

Guaranty Trust Co., Ex., v. Blodgett, 287 U. S. 509, l. c. 513;
Roe v. Kansas, 278 U. S. 191, l. c. 193;
Kersh Lake Drainage Dist. v. Johnson, 309 U. S. 485;
Bacon & Sons v. Martin, 305 U. S. 380, l. c. 381.

(4) The Supreme Court, as a general rule, will follow the construction given a state statute by the highest court of the state in order to determine whether a federal question is involved within its meaning.

McElvaine v. Brush, 142 U. S. 155, l. c. 160;
Quong Ham Wah Co. v. Industrial Comm., 255 U. S. 445, l. c. 448.

(5) A decision of a state court resting upon the construction, and not upon the validity, of the state statute, does not present a federal question.

Snell v. Chicago, 152 U. S. 191.

(6) The due process clause of the Fourteenth Amendment does not control methods of statutory procedure or give jurisdiction to this Court to review mere errors of law alleged to have been committed by a state court in the performance of its duties within the scope of its authority concerning matters nonfederal in character.

McDonald v. Oregon R. R. & Nav. Co., 233 U. S. 665;
Kansas City So. Ry. Co. v. Road Improvement Dist., 266 U. S. 379.

II.

No federal question was decided by the state court, nor was the decision of any federal question necessary by said Court for a determination of said cause.

(1) Where no federal or constitutional question was involved or decided by a state court, and the decision of a federal question by the state court was not necessary to a determination of the case, then the writ should not be granted.

Adams v. Russell, 229 U. S. 353, l. c. 358 et seq.;
Snell v. Chicago, 152 U. S. 191, l. c. 196.

(2) The challenged decision of the state court rests upon independent grounds, not involving a federal question, and is broad enough to maintain the judgment. Therefore, the petition for a writ of certiorari should be denied without considering any federal question that also may have been presented.

Murdock v. Memphis, 20 Wall. (87 U. S.) 590;
Leathe v. Thomas, 207 U. S. 93;
Ark. So. R. R. Co. v. German Nat. Bank, 207 U. S. 270;
Waters Pierce Oil Co. v. Texas, 212 U. S. 112;
Susquehanna etc. v. State Tax Com., 283 U. S. 291, l. c. 300.

(3) The state court decided this case upon grounds which had no relation to any federal question. There is no pretense that the state court adopted its view of a non-federal question in order to evade an issue under the Federal Constitution. Under such conditions, this Court will accept the decision of the state court, whether right or wrong.

Nickel v. Cole, 256 U. S. 222, l. c. 225.

(4) According to the well-established doctrine of this Court with respect to cases coming from state courts, unless a decision upon a federal question was necessary to the judgment, or in fact was made the ground of it, the writ must be dismissed. And even when an erroneous decision upon a federal question is made a ground, if the judgment also is supported upon another which is adequate by itself, and which contains no federal question, the same result must follow, as a general rule. Moreover, ordinarily this Court will not inquire whether the decision upon the matter not subject to its revision was right or wrong.

Ark. So. R. R. Co. v. German Nat. Bk., 207 U. S. 270;
Allen v. Arguimbau, 198 U. S. 149.

(5) Even though the state court had considered and determined a federal question, nevertheless, since the judgment of the state court against petitioner was based upon a decision of general law broad enough to support the decision, the Supreme Court will not consider the federal question.

Municipal Sec. Co. v. Kansas City, 246 U. S. 63;
Bilby v. Stewart, 246 U. S. 255;
Minn. etc. Ry. v. Washburn Lignite Coal Co., 254 U. S. 370.

(6) Even if a federal question be involved, nevertheless there is also an independent ground of state procedure as the basis of the decision below, involving no federal question, and broad enough to sustain the judgment. Therefore this Court is without jurisdiction.

Doyle v. Atwell, 261 U. S. 590;
McCoy v. Shaw, 277 U. S. 302.

And this is true even though this Court might think that the position of the state court is unsound.

Klinger v. Missouri, 13 Wall. 257, 20 L. Ed. 635.

III.

The questions submitted by petitioner to this Court are, under the evidence, unsubstantial, devoid of merit, fictitious and frivolous, and therefore the writ should be denied.

Miller & Lux v. Sacramento Drainage Dist., 256 U. S. 129;
House v. Road Imp. Dist., 266 U. S. 175;
Campbell v. Olney, 262 U. S. 353;
Parker v. McLain, 237 U. S. 469.

IV.

Petitioner's constitutional rights were not violated by reason of the trial court granting permission to plaintiff to amend its petition.

(1) It is not the function of the Supreme Court of the United States to decide local questions, and the final judgment of the state court must be taken as determining that the procedure adopted satisfied all state requirements.

United Gas Co. v. Texas, 303 U. S. 123, l. c. 139.

(2) Irregularities and errors in proceedings under a state statute can be corrected in state courts only. Due process of law does not mean that the Federal Government guarantees the correctness of every decision of a state court.

Central Land Co. v. Laidley, 159 U. S. 103, l. c. 110.

(3) The due-process clause of the Fourteenth Amendment does not control methods of statutory procedure or give jurisdiction to this Court to review mere errors of law alleged to have been committed by a state court in

the performance of its duties within the scope of its authority concerning matters non-federal in character.

McDonald v. Oregon R. R. & Nav. Co., 233 U. S. 665;
Kansas City So. Ry. Co. v. Road Improvement Dist., 266 U. S. 379.

(4) Irregularities and mere errors in proceedings under the state statute in question are not material for purposes of appellate review by this Court. The question before the Court is not whether the courts below having jurisdiction of the case and the parties have followed the law, but whether the law, if followed, would have furnished the protection guaranteed by the Constitution. The authority of the Supreme Court does not extend beyond an examination of the power of the courts below to proceed at law under the facts and the law applicable.

Marrow v. Brinkley, 129 U. S. 178.

(5) Under the statutes of Missouri the trial court properly exercised its discretion in permitting plaintiff in this case to amend its petition in the manner specified.

1939 R. S. Mo., Sec. 971;
1939 R. S. Mo., Sec. 973;
1939 R. S. Mo., Sec. 970;
1939 R. S. Mo., Sec. 969.

(6) The discretion of the trial court in allowing amendments under Sec. 971 will not be interfered with on appeal unless it has been abused.

Laughlin v. Leigh, 226 Mo. 639;
Moore v. Mansfield (Mo.), 286 S. W. 353;
Amos v. Fleming et al., 221 Mo. App. 559;
Lynn v. Assur. Co. (A.), 111 S. W. (2d) 231;
Simon v. Kresge Co. (A.), 103 S. W. (2d) 523;
Wooldridge v. Scott (A.), 102 S. W. (2d) 958;
Cramer v. Parker (A.), 100 S. W. (2d) 640;

Realty Co. v. Kleine (A.), 82 S. W. (2d) 605;
Dyer v. Harper, 336 Mo. 52;
Oliver v. Wilkey (A.), 62 S. W. (2d) 776;
Growers' Ass'n v. Sullinger (A.), 45 S. W. (2d) 887;
Bradley v. Page (A.), 46 S. W. (2d) 208.

(7) Courts are liberal in granting amendments where cause of action is not changed.

Scott v. Public Service Co. (A.), 115 S. W. (2d) 518;
Woolridge v. Milling Co. (A.), 102 S. W. (2d) 958;
Jensen v. Hinderks, 338 Mo. 459;
Payne v. Ins. Co., 229 Mo. App. 901.

(8) Under Section 969 no variance between the allegations in the pleading and the proof is material unless the opposite party has been actually misled thereby to his prejudice.

Fischer v. Max, 49 Mo. 404;
Olmstead v. Smith, 87 Mo. 602;
Evans v. Evans, 52 S. W. 12;
Horse Co. v. Bennett, 52 Mo. App. 333;
Ridgeway et al. v. Railway, 161 Mo. App. 260.

(9) The party complaining of a variance between the pleading and the proof must not only interpose a timely and specific objection to the introduction of the evidence offered but must file affidavit of surprise, and if he fails to do so, it is too late to complain in the appellate court.

Bank v. Phillips, 179 Mo. App. 488;
Thomas v. Construction Co., 189 Mo. App. 623;
Mekos v. Fricke, 159 Mo. App. 631;
Huggins v. City of Hannibal (A.), 12 S. W. (2d) 504;
Oaks v. Short (A.), 292 S. W. 738;
Walton v. Carlisle, 313 Mo. 281;
Bammert v. Kenefick (Mo.), 261 S. W. 78;
Powell v. Schofield (A.), 15 S. W. (2d) 876;
Swift v. Ry. Co. (A.), 15 S. W. 964.

(10) Under Section 969 an affidavit setting forth in what respect a party has been misled is the only test of the materiality of a variance.

Gaty v. Sack, 19 Mo. App. 470;
Bigham v. Tinsley, 149 Mo. App. 468;
Mekos v. Fricke, 159 Mo. App. 631.

(11) And the variance can only be taken advantage of by such affidavit.

Olmstead v. Smith, 87 Mo. 602;
Meyer v. Chambers, 68 Mo. 626;
Ferris v. Thaw, 72 Mo. 446;
Brown v. Ry. Co., 31 Mo. App. 661;
Mellor v. Ry. Co., 105 Mo. 455;
Newton v. Harvey (A.), 202 S. W. 249.

(12) Where no affidavit of surprise because of an amendment is filed, it is not error to refuse a continuance after allowing the amendment.

Brinkman v. Luhrs, 60 Mo. App. 512.

V.

Constitutional rights of petitioner were not violated by refusal of State Supreme Court to transfer the cause to the Court en banc.

State v. Moore, 159 U. S. 675.

VI.

The decision of the Supreme Court of Missouri, under the evidence, was correct, and it did not deny, impair or infringe in any manner whatsoever any of petitioner's constitutional rights, and her petition for a writ of certiorari should be denied.

This statement is supported by the following authorities, to wit:

(A) The Actions and Conduct of Appellant and Her Predecessor in Title Preclude the Assertion of the Claims Now Made by Her.

(1) The appellant stands in the position of her predecessor in title.

Bartlett Trust Co. v. Elliott, 30 Fed. (2d) 700, l. c. 705, aff. in 40 Fed. (2d) 351;
Shepard v. Barren, 194 U. S. 553, l. c. 567;
English v. Arizona, 214 U. S. 359, l. c. 365;
Wright v. Davidson, 181 U. S. 371, l. c. 377.

(2) A landowner who was a petitioner for the organization of the drainage district cannot object to the validity of the organization and assessments therein in a suit against him for delinquent taxes. That would amount to a collateral attack, which is prohibited.

State ex rel. James v. Young, 255 Mo. 627, 164 S. W. 579;
State ex rel. v. Galloway, 255 Mo. 637, 164 S. W. 581;
Mingo Drainage Dist. v. Railway, 281 S. W. 60.

(3) It is a well-settled rule that one who has himself invoked a statute, or who has received the benefits flowing from a statute, is estopped to assail the action taken by the state court when he becomes dissatisfied with the result, or to assert the unconstitutionality of the state court proceeding.

Wall v. Parrott Silver & Copper Co., 244 U. S. 407, l. c. 411;
Daniels v. Tearney, 102 U. S. 415, l. c. 421;
Grand Rapids & I. R. Co. v. Osborne, 193 U. S. 17;
United Fuel Gas Co. v. Railroad Com., 278 U. S. 300, l. c. 307;
Owens v. Corporation Com., 41 Fed. (2d) 799.

(4) Where the landowner is given an opportunity in the organization of the district to file exceptions to the report

of the commissioners in the assessment of benefits and damages and is also given the right to have a hearing by the Court thereon, and that, having failed to exercise this right or to raise the question as to benefits to his land, or if raised in that proceeding for the Court to determine the matter adversely to him, would necessarily conclude the landowner and prevent him from raising the same question at a later time.

Labaddie Bottoms River Protection Dist. of Franklin County v. Randall, 68 S. W. (2d) 871, l. c. 873;
Garden of Eden Drainage District v. Bartlett Trust Co. et al., 330 Mo. 554, 50 S. W. (2d) 627, 84 A. L. R. 1078;
In re Mingo Drainage District, 267 Mo. 268, l. c. 284, 183 S. W. 611;
Little River Drainage District v. St. Louis, M. & S. E. Railroad, 236 Mo. 94, 139 S. W. 330;
U. S. v. Payne, 264 U. S. 446, l. c. 454;
Beck v. Mo. Valley Drainage District, 46 Fed. (2d) 632 (certiorari denied 284 U. S. 618).

(5) Where landowners paid two years taxes to the district based on estimated benefits, they thereby acquiesced in and ratified said assessment of benefits and should not be heard to complain that they were not notified thereof.

Bartlett Trust Co. v. Elliott, 30 Fed. (2d) 700, aff. in 40 Fed. (2d) 351;
State ex rel. v. Bates, 235 Mo. 262;
Stamper v. Roberts, 90 Mo. 683.

(6) Appellant and her predecessor in title has waived any right which she might have to complain as to the assessment of taxes and has been guilty of laches.

Bartlett Trust Co. v. Elliott, 30 Fed. (2d) 700, aff. in 40 Fed. (2d) 351.

(7) Appellant and her predecessor in title stood by and knew that bonds were being sold to provide funds for the execution of the plans for reclamation; they saw the plan being executed and are now enjoying the benefits conferred by the execution of said plan. This constitutes an estoppel.

Bartlett Trust Co. v. Elliott, 30 Fed. (2d) 700, aff. in 40 Fed. (2d) 351;
State ex rel. v. Bates, 235 Mo. 262.

(8) The question of whether or not appellant's lands have been benefited by the reclamation work is res adjudicata, for the reason that it was first affirmatively settled by the adjudication of the Circuit Court of Franklin County in the proceedings for the incorporation of the District and was subsequently reiterated by both the Circuit Court of Franklin County and the St. Louis Court of Appeals in the litigation instituted by plaintiff District for the collection of annual assessments.

Labadie Bottoms River Protection Dist. v. Randall, 68 S. W. (2d) 871.

(B) Appellant's Constitutional Rights Have Not Been Denied, Impaired or Infringed in Any Manner Whatsoever.

(1) The fact that a person's property has been included in a reclamation district in no manner impairs or transgresses his constitutional rights provided he is given the right at some stage of the proceeding to have the hearing upon the question of benefits and damages.

Beck v. Missouri Valley Drainage Dist., 46 Fed. (2d) 632 (certiorari denied 284 U. S. 618, l. c. 635-636);
Bartlett Trust Co. v. Elliott, 30 Fed. (2d) 700, l. c. 704 (affirmed 40 Fed. [2d] 351);
Embree v. Kansas City and Liberty Blvd. Road Dist., 240 U. S. 242;
Toncray v. City of Phoenix, 47 Fed. (2d) 448.

Even if the lands received no direct benefits, that per se is not enough to exempt them under the Fourteenth Amendment.

Miller & Lux, Inc., v. Sacramento Drainage Dist., 256 U. S. 129;
House v. Road Imp. Dist., 266 U. S. 175.

(2) Neither the appellant nor her predecessor in title having filed exceptions to the report of the commissioners, she is not now entitled to invoke the matters complained of for the reason that where a party fails or refuses to avail himself of the opportunity provided by law in the proceeding for the incorporation of a reclamation district to object to the plan or the assessments or any defects or inequalities therein, he will not later be permitted to question upon constitutional grounds the benefits assessed.

Toncray v. City of Phoenix, 47 Fed. (2d) 448, l. c. 451;
Utley v. City of St. Petersburg, 292 U. S. 106, 54 Sup. Ct. 393, l. c. 595;
Bartlett Trust Co. v. Elliott, 30 Fed. (2d) 700, l. c. 704-5;
Fallbrook Irrigation Dist. v. Bradley, 164 U. S. 112, l. c. 157;
Davidson v. New Orleans, 96 U. S. 97, l. c. 104-5;
Farncomb v. Denver, 252 U. S. 7, l. c. 11;
First National Bank v. Board of County Commissioners, 264 U. S. 450.

(3) In the absence of fraud or an unquestionable showing that the assessment complained of is so grossly inequitable, illogical, palpably arbitrary and discriminatory as to disclose a clear abuse of power and authority, a court will have no jurisdiction on constitutional grounds to review assessments made by a reclamation district incorporated under state law or municipal ordinance.

Valley Farms v. Westchester, 261 U. S. 155;
Miller & Lux, Inc., v. Sacramento Drainage Dist., 256 U. S. 129;

St. Louis Land Co. v. Kansas City, 241 U. S. 419, l. c. 429-30;
Embree v. Kansas City Road Dist., 240 U. S. 242;
Mt. St. Mary's Cemetery v. Mullins, 248 U. S. 501.

(a) The cases cited and relied upon by appellant are readily distinguishable from the foregoing authorities as is evident from the following local citations, where may be found either distinguishing facts, important differentiations or correct statements of the rule applicable in cases such as the present:

Yick Wo v. Hopkins, 118 U. S., l. c. 358-9, 366-7, 373-4;
The Virginia Coupon Cases, 114 U. S., l. c. headnote 1, at page 270;
Myles Salt Co. v. Iberia Drainage Dist., 239 U. S., l. c. 481, 482-3, 485;
N. C. & St. L. Railway Co. v. Walters, 294 U. S., l. c. 412;
Gast Realty Co. v. Schneider Granite Co., 240 U. S., l. c. 58-60;
Norwood v. Baker, 172 U. S., l. c. 279.

(4) Where a party or his predecessor in title asks for and encourages the levy of a tax he will be estopped to complain of its illegality, as constitutional guaranties may be waived just as any other substantive rights. Such rule is applicable to the instant proceeding, as the Point Prairie Hunting & Fishing Club, from whom appellant acquired title, stated in the petition for the formation of the plaintiff district that they desired "to form a levee district for the purpose of having the lands and other property * * * protected from the effect of wash or bank erosion by the Missouri River"; that the protection of the lands hereinafter described from bank wash or erosion by the waters of the Missouri River will be a public utility and benefit, and will be conducive to better health, convenience and

welfare, and will render said lands more valuable and fit for agricultural purposes''; and ''that the present wash or bank erosion of the lands in said district will continue unless protection be had.'' Moreover, the hunting and fishing club stood by with tacit approval while the improvements were being made and bonds issued and sold to pay for said improvements. Subsequently both the hunting and fishing club and the appellant voluntarily paid the benefit assessments for a number of years.

Wright v. Davidson, 181 U. S. 371, l. c. 377;
Shepard v. Barron, 194 U. S. 553, l. c. 567;
English v. Territory of Arizona, 214 U. S. 359, l. c. 365;
Bartlett Trust Co. v. Elliott, 30 Fed. (2d) 700, l. c. 705 (affirmed 40 Fed. [2d] 351);
Utley v. City of St. Petersburg, 292 U. S. 106, l. c. 111, 109, 54 Sup. Ct. 593;
Dunn v. Fort Rend County, 17 Fed. 329, l. c. 333;
Toncray v. City of Phoenix, 47 Fed. (2d) 448, l. c. 451.

ARGUMENT.

A.

Petitioner's Contention That Her Constitutional Rights Were Denied by the Decision of the Supreme Court of Missouri Holding That the Amendment of the Original Plan of Reclamation Did Not Operate as an Abandonment of the Original Plan of Reclamation and of All Proceedings, Decrees, Records, Resolutions, Levies and Liens Thereunder, and That Consequently the Annual Levy of Installment and Maintenance Taxes for the Year 1934, Based Upon Such Original Plan and Proceedings, Was Not Void, Presents No Federal Question, Is Not a Sound Contention, Is Devoid of Merit, Is Fictitious and Frivolous.

1. The question decided by the state court involved a determination of questions of fact, under the evidence, and the construction of Chapter 79, Article VII, Sections 12494 et seq., Revised Statutes of Missouri 1939, and particularly section 12538, as applicable to such facts.

The constitutionality and fairness of the statutes is not questioned by petitioner.

This Court has generally held that where a state statute is admitted to be valid (which is the situation here), and the only question is whether it has been correctly construed, the Supreme Court of the United States has no jurisdiction (Cases, Brief Point I).

The due-process clause of the Fourteenth Amendment does not control methods of statutory procedure, or give jurisdiction to this Court to review mere errors of law alleged to have been committed by a state court in the performance of its duties within the scope of its authority concerning matters nonfederal in character (Cases, Brief Point I).

The Supreme Court of Missouri held that under Section 12538, Revised Statutes of Missouri 1939, it was not obligatory or compulsory upon the respondent District to make additional assessments merely because the original Plan of Reclamation was amended. The construction of said statute, as given by the Supreme Court of Missouri, should be accepted by this Court.

The ascertainment of what is essential under the state statute is a state question within the final jurisdiction of the highest court of the state. When the Supreme Court of Missouri decided that a particular formality was or was not essential under the state statute, such decision presents no federal question (Cases, Brief, Point I).

This Supreme Court, as a general rule, will follow the construction given a state statute by he highest court of the state in order to determine whether a federal question is involved within its meaning.

2. The decision of the Supreme Court of Missouri turned upon the determination of a question of fact.

The state court held that upon the evidence and the record before it there had been no "abandonment" of the original Plan of Reclamation and that there was no "substitution" of a new Plan of Reclamation for the original plan, but that the original Plan of Reclamation had merely been amended.

This was a question of fact, and the Supreme Court of the United States will follow such findings of fact as are made by the state court (Cases, Brief, Point I).

3. The state court did not decide any constitutional question nor was it necessary to decide any constitutional question.

Petitioner's claim that her constitutional rights were violated was **based solely and exclusively** on the ground that the amendment of the original Plan of Reclamation

operated as a complete and "**total abandonment**" of the original Plan of Reclamation and of all proceedings, decrees, record, resolutions, levies or liens thereunder.

When the Supreme Court of Missouri found the fact to be and held that there was no abandonment of the original Plan of Reclamation and the proceedings had thereunder, there was then no federal question before the Supreme Court of Missouri to be decided. Consequently, the state court did not decide any federal question. There was no constitutional question before it for decision under the facts which were found to exist, nor was the decision of the Supreme Court of any federal question necessary by said Court for a determination of said cause. The decision of the Supreme Court of Missouri rests upon independent grounds, which are broad enough to maintain the judgment.

This Court has held in many cases that where the challenged decision of the state court rests upon independent grounds, not involving a federal question, and is broad enough to maintain the judgment, a petition for a writ of certiorari should be denied without considering any federal question that also may have been presented (Cases, Brief, Point II).

This Court has also held that, even though the state court had considered and determined a federal question, nevertheless, since the judgment of the state court against the petitioner was based upon a decision of general law broad enough to support the decision, the Supreme Court of the United States will not consider the federal question (Cases, Brief, Point II).

The Supreme Court of Missouri decided this case upon grounds which had no relation to any federal question. There is no pretense here that the state court adopted its view of a nonfederal question in order to evade an issue under the Federal Constitution. Under these conditions,

this Court will accept the decision of the state court, whether right or wrong.

According to the well-established doctrine of this Court, unless a decision upon a federal question was necessary to the judgment or in fact was made the ground of it, the petition for the writ should be denied; and even when an erroneous decision upon a federal question is made a ground, if the judgment also is supported upon another which is adequate by itself, and which contains no federal question, the same result must follow as a general rule [Cases, Brief, Point II (4)].

4. The decision by the state court that there had been no abandonment of the original Plan of Reclamation or of the proceedings had thereunder by reason of an amendment having been made to said plan at a later date is clearly a correct determination of the facts under the evidence.

After the original plan had been filed and notice of the filing given, Commissioners were appointed by the Court to assess benefits and damages under the Plan; the Commissioners made their report; it was filed in court and all parties were given statutory notice thereof and, under the statute, were given the right to file exceptions and objections. Thereafter the Court entered its decree confirming the report and thereafter all further proceedings were had pursuant to the statute to perfect the lien of respondent district based upon such assessment of benefits; proper taxing resolution was adopted; bonds were authorized, issued and sold; contracts for the construction of the improvements were let and construction begun. (These proceedings, decrees, contract obligations, etc., could not be abandoned at the option of one party.)

Thereafter a petition was filed **to amend** the original Plan in several minor respects, the principal amendment being the change in direction of one levee, which would include certain additional lands within the levee at the

eastern end of the district. Upon a hearing the Court, on December 29, 1924, granted permission **to amend** the original Plan of Reclamation (Res. Add. Abs. pp. 38-41), at which time a major portion of the improvements provided for in the original Plan of Reclamation had been constructed.

Clearly, under the evidence, it could not be said that all contract rights, bond obligations, assessments, liens, etc., were nullified and abandoned merely by reason of the amendment of the Plan of Reclamation in a minor respect.

Section 12538, Revised Statutes of Missouri 1939, gave to the Board of Supervisors of the District the power to cause amendments to be made in the Plan of Reclamation and provided that "additional assessments **may be made** to pay for any additional work required by such amendments to the plan." It was not obligatory upon the District to cause new assessments. The funds which the District had were sufficient to complete the improvements mentioned in the Plan of Reclamation and in the amendments thereto. Consequently, no new taxing resolution was required or adopted and the District stood upon all of the original proceedings, records, decrees and liens which had been theretofore legally and properly adopted. Clearly, under all the evidence, the decision of the Supreme Court was correct in holding that the amendment of the plan did not operate as any abandonment of prior proceedings.

5. Petitioner's contention, under the record, is unsubstantial, devoid of merit and frivolous (Cases, Brief III).

B.

Petitioner's Contention That Her Constitutional Rights Were Violated by the State Court Because It Held, in Construing Constitutional State Procedural Statutes, That Under Such Statutes the Trial Court Was Acting Within Its Statutory Discretion in Permitting the Plaintiff to Amend Its Petition in This Case After Trial and Before Judgment, and That There Was No Change of Cause of Action by Amendment, Presents No Federal Question, Is Devoid of Merit and Frivolous.

1. The statutes of Missouri expressly conferred discretion upon the trial court to permit the amendment to be made (Sections 971, 973, 974, 969 and 970, R. S. Mo. 1939, hereinafter set forth in Appendix).

2. The Supreme Court of Missouri, and other appellate courts of Missouri, in construing these procedural statutes, have on numerous occasions held that the discretion of the trial court in allowing amendments will not be interfered with on appeal unless it is shown that there has been an abuse of such discretion (Cases cited in Brief under Point IV, Sec. 6).

3. The Supreme Court of Missouri and other appellate courts in Missouri, in construing the above mentioned procedural statutes, have held in numerous cases that said statutes are to be liberally construed, and that the trial courts are to be liberal in granting amendments where the cause of action is not changed (Cases cited in Brief under Point IV, Sec. 7).

4. The amendments made to the petition did not change the cause of action pleaded in the petition and were not regarded seriously by petitioner. The petitioner, heretofore commenting before the Supreme Court of Missouri upon the effect and materiality of the amendment, stated:

"It is not at all clear that plaintiff succeeded in amending its petition so as to state a different cause of action * * *" (Record, p. 192).

5. If the amendment had been of importance, the defendant, under the statutes and laws of Missouri, could have had the case continued to give her an opportunity to obtain and present any evidence which she deemed necessary in view of the amendment. She could have filed an affidavit alleging surprise or that she was misled by such amendments and have obtained proper redress from the trial court. No such action was taken by defendant upon such amendment being made, but she elected to permit the Court to decide the case on plaintiff's evidence without introducing any evidence whatsoever.

6. The decision of the Supreme Court of Missouri involved a construction and application of procedural statutes of the State of Missouri, which are admitted to be constitutional. The decision of the Supreme Court of Missouri on this matter clearly involved no federal question [Cases—Brief Point IV, points (1), (2), (3), (4)].

This Court has expressly held that the due process clause of the Fourteenth Amendment does not control methods of statutory procedure, or give jurisdiction to this Court to review mere errors of law alleged to have been committed by a state court in the performance of its duties within the scope of its authority concerning matters non-federal in character [Brief, IV (3)].

This Court has held that the meaning attributed by a State Supreme Court to a statute of the state must be accepted by this Court, on review, as though such meaning had been specifically expressed in the statute [Brief I (3)].

There is no foundation, color or ground for the assertion by petitioner that a federal question is involved in the

above contention. There is no real, substantial controversy on any federal question which deserves the serious attention of this Court.

Under no stretch of the imagination could this decision of the Missouri Supreme Court permitting the petition to be amended be regarded as a federal question, nor can the permission of the state court to make the amendment to the petition be construed as a denial of any constitutional rights of the petitioner.

C.

Petitioner's Contention That Her Constitutional Rights Were Violated Because the State Court Refused to Hold, Under the Evidence, That "As a Matter of Law" Her Lands Had Not Been Directly Benefited by the Construction of the Improvements Provided for Under the Plan of Reclamation and the Amendments Thereto, and That Therefore Her Lands Had Been Unjustly and Arbitrarily Assessed, Is Not Sound, Presents no Federal Question, Is Without Merit or Substance, and Is Frivolous.

1. Whether or not the lands were benefited is purely a question of fact to be determined from the evidence.

Petitioner offered no evidence whatever to the effect that her lands were not benefited, yet seeks to convey to the Court by innuendo and implication the idea that her lands received no benefits, and demands that the Court find "as a matter of law," without any supporting evidence, that her lands were not benefited. The refusal of the Supreme Court of Missouri to so find violates no constitutional provisions and presents no federal question.

2. Petitioner's predecessor in title was given due notice of the filing of the Commissioners' report assessing benefits against petitioner's land (Plff. Ex. 11, App. Abs. p. 56).

Petitioner's predecessor in title was given the opportunity, 18 years ago, to file exceptions and objections to the assessment of benefits against the lands in question, pursuant to Sec. 12509, R. S. Mo. 1939, and was afforded an opportunity under said statute to appeal from the decision of the Court.

Petitioner's predecessor in title filed no exceptions or objections and took no appeal from the decree confirming the assessments, and in all respects acquiesced therein.

The petitioner is bound by the actions and conduct of her predecessor in title.

Bartlett Trust Co. v. Elliott, 30 F. (2d) 700, l. c. 705, aff. in 40 F. (2d) 351;
Shepard v. Barren, 194 U. S. 553, l. c. 567;
English v. Arizona, 214 U. S. 359, l. c. 365;
Wright v. Davidson, 181 U. S. 371, l. c. 377;
Utley v. City of St. Petersburg, 292 U. S. 106;
Fallbrook Irrigation Dis. v. Bradley, 164 U. S. 112, l. c. 157;
Davison v. New Orleans, 96 U. S. 97, l. c. 104-5;
Farncomb v. Denver, 252 U. S. 7, l. c. 11;
First National Bank v. Board of County Commissioners, 264 U. S. 450.

3. The record further shows:

(a) Petitioner's predecessor in title filed the petition on June 7, 1923, praying that its lands be included within respondent district, and that it desired to form the district **to protect its lands from the effect of wash or bank erosion by the Missouri River, and that such wash and bank erosion would continue unless protection was had** (Res. Add. Abs. pp. 4-9).

(b) The engineers' report in connection with the Plan of Reclamation states that if the erosion by the Missouri River is not prevented that it "would probably take away

most of the lands within the district eventually" (App. Abs. p. 74).

(c) In the case of **Labaddie Bottoms River Protection District v. Randall, 68 S. W. (2d) 871,** in which case petitioner contended that her lands had not been benefited, the Circuit Court rendered judgment against her, holding that the lands had been benefited, and the **St. Louis Court of Appeals held that there was ample, sufficient evidence to support the finding of the trial court that the lands in question were benefited.**

(d) In the case of Lillian I. Randall v. Labaddie Bottoms River Protection District, in the United States District Court for the Eastern Division of the Eastern Judicial District of Missouri, Division 1 thereof (App. Abs. p. 41), the United States District Judge rendered a written decision and opinion on March 23, 1938, in which the Court said:

> "1. That by reason of the findings, judgments and decrees made and entered by the Circuit Court of Franklin County, Missouri, in the proceedings in said court relating to the incorporation of defendant district, the adoption of the plan of reclamation and amended plan of reclamation, the approval and confirming of the reports of the commissioners and the imposing of assessments of benefits upon lands within defendant district, all above mentioned, and further by reason of the suits, trials and judgments rendered against Point Prairie Hunting and Fishing Club and against complainant (Lillian I. Randall), respectively, in the several suits above mentioned brought by defendant district against said respective parties for the collection of taxes, all of the issues, contentions, controversies, matters and questions presented by the complainant herein were, or could and should have been fully and completely litigated, determined and adjudicated in the aforementioned proceedings and

suits and therefore the issues in this case are res adjudicata.

2. That under the facts in this case the complainant is estopped and barred by reason of her conduct and that of her predecessor in title from prosecuting this suit.

3. **That the facts in this case disclose that complainant's land has received substantial benefits from the construction of the improvements mentioned in the amended plan of reclamation and complainant therefore has no just cause of complaint."** (Emphasis ours.)

4. The record shows that after Lillian I. Randall acquired title to the lands in question by virtue of her purchase at an execution sale on a judgment in favor of Respondent District against her predecessor in title (Plf. Exs. 38-44, Res. Add. Abs. pp. 72-88), **she voluntarily paid to the District the taxes** which were due the District for the year 1930 and subsequently paid, after judgment, the taxes due for the year 1931 (App. Abs. pp. 139-140; Res. Add. Abs. p. 100).

Under these circumstances, the assessment of benefits has been ratified by petitioner and the question of benefits has been heretofore determined, and she cannot now be heard to say that her lands have not been benefited.

Bartlett Trust Co. v. Elliott, 30 F. (2d) 700, aff. in 40 F. (2d) 351;
State ex rel. v. Bates, 235 Mo. 262;
Stamper v. Roberts, 90 Mo. 683.

This contention of petitioner is without merit or substance, is frivolous (Cases, Brief III).

D.

The Constitutional Rights of Petitioner Were Not Violated by Reason of the Refusal of the State Supreme Court to Transfer the Cause to the Court en Banc.

It has been held by this Court that where the judgment of a division of the Supreme Court adverse to a claim made under the federal Constitution is correct, a refusal of the Court en banc to grant a hearing is not a denial of due process of law.

State v. Moore, 159 U. S. 675, 16 Sup. Ct. Rep. 179, affirming 121 Mo. 514.

E.

The Decision of the Supreme Court of Missouri, Under the Evidence in This Case, Was Correct and Was for the Right Party; It Denied Petitioner None of Her Constitutional Rights, and Her Petition for a Writ of Certiorari Should Be Denied.

The evidence in this case discloses:

1. Petitioner's predecessor in title joined with other landowners in filing the petition for the incorporation of the district for the purpose of constructing the improvements provided for under the Plan of Reclamation and amendments thereto.

2. Petitioner's predecessor in title was given notice of the filing of the Commissioners' report assessing benefits against its lands, and was afforded an opportunity under the statute to file exceptions and objections thereto, but it elected not to make any exceptions or objections to the Plan of Reclamation or to the amendments thereto, or to the assessment of benefits against its lands.

3. Petitioner acquired title to the lands in question by virtue of her purchase at an execution sale under a judg-

ment rendered in favor of the District against her predecessor in title for delinquent taxes due the District.

4. Petitioner voluntarily paid 1930 taxes due the District.

5. Petitioner, when sued for 1931 taxes, had the opportunity to raise all constitutional questions, which was not done.

6. Petitioner paid the 1931 taxes to the District after judgment against her.

7. Petitioner has been guilty of laches in raising constitutional questions and by virtue of her conduct and that of her predecessor in title. She has waived the questions now presented to the Court, and is estopped by reason of her conduct from now pressing said contentions.

Under all of these facts, it cannot be said that the decision of the Supreme Court of Missouri denied petitioner any of her constitutional rights.

Authorities in support of our position under this point will be found in this brief under point VI.

We respectfully submit that petitioner's writ for a certiorari should be denied.

Respectfully submitted,

GUSTAVUS A. BUDER, JR.,
500 Buder Building,
St. Louis, Missouri,
RANDOLPH H. SCHAPER,
Washington, Missouri,
ERWIN E. SCHOWENGERDT,
500 Buder Building,
St. Louis, Missouri,
Counsel for Respondent.